FILED
DEC 18 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-807

In The

Supreme Court of the United States

October Term, 1998

KMART CORPORATION, as Named Fiduciary of the Kmart Corporation Master Welfare Benefit Plan,

Petitioner,

vs.

DAVID SCHLEIBAUM, SANDY SCHLEIBAUM and JUDITH KIMMERLING,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ANDREW C. MALLOR
Counsel of Record
GEOFFREY M. GRODNER
KENDRA GOWDY GJERDINGEN
MALLOR CLENDENING
GRODNER & BOHRER
Attorneys for Respondents
Post Office Box 5787
511 Woodscrest Drive
Bloomington, Indiana 47407
(812) 336-0200

150297

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Seventh Circuit provided the appropriate remedy for a violation of 29 U.S.C. § 1133, when a substantive harm has resulted and a remand to the plan administrator would be futile.

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	v
Statement of the Case	1
A. The petition specifically misrepresents certain relevant facts and distorts the factual background in general.	2
1. Certain facts were known only to Kmart prior to litigation.	2
2. The facts and chronology of events presented from Mr. Schleibaum's perspective.	3
B. The petition makes certain misrepresentations regarding the District Court's opinion.	8
C. The petition misrepresents the holding of the Seventh Circuit.	9
Reasons for Denying the Writ	10
I. The Seventh Circuit's Decision As To An Appropriate Remedy For Violation Of Section 503 Is Not In Conflict With This Court's Decisions.	10

Contents

Page

A. The issue is the appropriate remedy for a substantive harm resulting from a violation of section 503, not for a breach of fiduciary duty. 11

B. The remedy sought is recovery of benefits due under the plan, not extracontractual damages. 14

II. The Seventh Circuit's Decision That Remand Has Been Made Futile By Kmart's Violation Of Section 503 Does Not Conflict With Other Courts Of Appeals On This Issue. 18

A. The issue is whether remand to the plan administrator is required when it would be a useless formality. 19

B. The issue is whether the failure to present evidence regarding all of Mr. Schleibaum's medical problems is the result of Kmart's violation of ERISA. 22

Conclusion 24

TABLE OF CITED AUTHORITIES

Page

Cases:

Armstrong v. Jefferson Smurfit Corp., 30 F.3d 11 (1st Cir. 1994) 16

Bast v. Prudential Ins. Co. of America, 150 F.3d 1003 (9th Cir. 1998) 17, 18

Concha v. London, 62 F.2d 1493 (9th Cir. 1995), *cert. denied*, 517 U.S. 1183 (1996) 16

Cuddington v. Northern Ind. Pub. Serv. Co., 33 F.3d 813 (7th Cir. 1994) 23

Fraser v. Lintas: Campbell-Ewald, 56 F.3d 722 (6th Cir. 1995), *cert. denied*, 516 U.S. 975 (1995) 16

Govindarajan v. FMC Corp., 932 F.2d 634 (7th Cir. 1991) 23

Halpin v. W.W. Grainger, Inc., 962 F.2d 685 (7th Cir. 1992) 20, 23

Harsch v. Eisenberg, 956 F.2d 651 (7th Cir. 1992), *cert. denied*, 506 U.S. 818 (1992) 14, 16, 17

Hein v. F.D.I.C., 88 F.3d 210 (3rd Cir. 1996) 16

Kent v. United of Omaha Life Insurance Company, 96 F.3d 803 (6th Cir. 1996) 19

Cited Authorities

Page

Lee v. Burkhart, 991 F.2d 1004 (2nd Cir. 1993) 16

Leigh v. Engle, 727 F.2d 113 (7th Cir. 1983) 20

Lockheed Corporation v. Spink, 517 U.S. 882 (1996) 13

Massachusetts Mutual Life Insurance Company v. Russell, 473 U.S. 134 (1985) 10, 14, 15

McLeod v. Oregon Lithoprint, Inc., 102 F.3d 376 (9th Cir. 1996), *cert. denied*, __ U.S. __ (1997) 15, 17

McRae v. Seafarers' Welfare Plan, 920 F.2d 819 (11th Cir. 1991) 17

Mertens v. Hewitt Associates, 508 U.S. 248 (1993) 12, 13, 15

Miller v. United Welfare Fund, 72 F.3d 1066 (2d Cir. 1995) 19

Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359 (1980) 10

Novak v. Andersen Corp., 962 F.2d 757 (8th Cir. 1992), *cert. denied*, 508 U.S. 959 (1993) 16

Powell v. Chesapeake and Potomac Tel. Co., 780 F.2d 419 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986) 16

Cited Authorities

	Page
Sandoval v. Aetna Life and Casualty Insurance Company, 967 F.2d 377 (10th Cir. 1992)	22
Schaub v. Consolidated Freightways, Inc. Extended Sick Pay Plan, 895 F. Supp 1136 (S.D. Ind. 1995)	20
Schleibaum v. Kmart Corporation, 153 F.3d 496 (7th Cir. 1998)	11
Sokol v. Bernstein, 803 F.2d 532 (9th. Cir. 1986)	16
Sommers Drug Stores Co. v. Corrigan Enters., 793 F.2d 1456 (5th. Cir. 1986), *cert. denied*, 479 U.S. 1034 (1987)	16
Spinelli v. Gaughan, 12 F.3d 853 (9th Cir. 1993)	16
Swaback v. American Information Technologies Corporation, 103 F.3d 535 (7th Cir. 1996)	21
Taft v. Equitable Life Assur. Society, 9 F.3d 1469 (9th Cir. 1993)	21
VanderKlok v. Provident Life & Accident Ins., Co., 956 F.2d 610 (6th Cir. 1992)	14, 20
Varity Corporation v. Howe, 516 U.S. 489 (1996)	12, 13, 15
Wardle v. Central States, Southeast & Southwest Areas Pension Fund, 627 F.2d 820 (7th Cir. 1980)	19

Page

Watkins v. Westinghouse Hanford Co., 12 F.3d 1517 (9th Cir. 1993) 16

Welsh v. Burlington Northern, Inc. Employees Benefits Plan, 54 F.3d 1331 (8th Cir. 1995) 19

Wolfe v. J.C. Penney Co., Inc., 710 F.2d 388 (7th Cir. 1983) 19, 23

Zimmerman v. Sloss Equip., Inc., 72 F.3d 822 (10th Cir. 1995) 16

Statutes:

29 U.S.C. § 1104 ..... 12, 13, 17, 18

29 U.S.C. § 1104(a) 11, 13

29 U.S.C. § 1109 15

29 U.S.C. § 1109(a) 14

29 U.S.C. § 1132 14

29 U.S.C. § 1132(a) 13, 15

29 U.S.C. § 1132(a)(1) 13

29 U.S.C. § 1132(a)(1)(B) 8, 11, 12, 14, 15, 16, 17

29 U.S.C. § 1132(a)(3) 12, 13, 15, 16

29 U.S.C. § 1133 ..... *passim*

Cited Authorities

Page

Other Authorities:

119 Cong. Rec. 30041 (1973), Leg. Hist. 1633 10

120 Cong. Rec. 29196 (1974), 3 Leg. Hist. 4665 10

H.R. Rep. No. 93-807, 93rd Cong., 2d Sess. 3, reprinted in 1974 U.S. Code Cong. & Admin. News 4639 ... 14

STATEMENT OF THE CASE

Kmart's petition for certiorari seeks this Court's review of the Seventh Circuit's opinion upholding the District Court's findings that Kmart violated section 503 of ERISA, and that the resulting substantive harm could not be remedied by the useless formality of remand to the plan administrator. Kmart's petition for certiorari also seeks this Court's review of the Seventh Circuit's remand to the District Court for appropriate relief for the substantive harm caused by Kmart's procedural violation.

Contrary to the representations of Kmart, the Seventh Circuit's determination of an appropriate remedy does not impose a duty to rule out the possibility of medical conditions other than the one for which benefits have been sought. It merely recognizes the plan administrator's duties, as imposed by section 503, when a claim for benefits is denied, to articulate an explanation to the plan participant that makes a rational connection between the issue, the evidence, the text and the decision made.

Also contrary to the representations of Kmart, the Seventh Circuit did not base its decision on evidence of medical conditions other than the one for which benefits had been sought and which had not been presented to the plan administrator. Rather, the decision was based on the fact that the plan participant was never given the opportunity to present such evidence when it was still possible due to Kmart's violation of the statute. The decision was also based on Kmart's own assertion at trial that no additional evidence could be presented to the plan administrator that would affect the decision because Mr. Schleibaum had died before the nature of the evidence required had been properly communicated to him. The Seventh Circuit did not order the consideration of new medical evidence,

only the fact that Kmart's violation of section 503 had made the presentation of new evidence impossible.

As explained in detail below, the Seventh Circuit's decision is consistent with the holdings of this Court and the other Courts of Appeals and there is no cause for this Court's review of the decision.

A. The petition specifically misrepresents certain relevant facts and distorts the factual background in general.

1. *Certain facts were known only to Kmart prior to litigation.*

Some of the facts included by Kmart in its "Factual Background" were known only to Kmart prior to the institution of this litigation. For example, Kmart states that the standard for qualifying for Social Security and LTD benefits was less demanding than the qualifying standard for the permanent and total disability benefit, in terms of both duration and scope of the disability. Pet. at 5. But Mr. Schleibaum was not aware of this differing standard and this lack of awareness prevented him from providing the medical evidence necessary to prevent Kmart from denying his life insurance benefit.

Kmart also states that the Life Plan Administrator determined that Mr. Schleibaum did not qualify for the permanent and total disability benefit primarily because the attending physician's statement submitted by Mr. Schleibaum's hip surgeon expressed a durational limitation of only a few months rather than life. Pet. at 6. Again, Mr. Schleibaum was not aware of this fact. Kmart's determination was based on the attending physician's statement which had been submitted several months earlier in connection with his temporary disability claim. Kmart did not identify the medical evidence

it had reviewed and it did not state that in its interpretation the evidence expressed a durational limitation of only a few months. *See* App. at 34a-36a.

2. *The facts and chronology of events presented from Mr. Schleibaum's perspective.*

When Mr. Schleibaum's medical leave extended past the period for temporary disability benefits, Kmart advised Mr. Schleibaum of the status of his benefits during his approved medical leave of absence in view of his continuing disability and sent him forms for applying for long term disability income benefits. App. at 31a. With respect to his group life and optional life insurance, Kmart stated that Mr. Schleibaum was

> currently insured for $59,000 under the non-contributory life insurance plan with an additional $177,000 under the contributory portion of the policy totaling $236,000.[1] This coverage will remain in force during your approved medical leave of absence for a maximum of one year. Should your disability be of a permanent and total nature, you may be eligible for continued coverage under the premium waiver provisions of the policy. If approved, your group life and optional life insurance may be continued for you at no cost until age 65.

App. at 32a.

Mr. Schleibaum applied for long term disability benefits through Kmart's plan. Kmart transmitted to Aetna the completed claim forms submitted by Mr. Schleibaum for long term disability benefits. Aetna approved his application for long

1. The parties have stipulated that the benefit payable at the time of Mr. Schleibaum's death was $260,000.

term disability benefits, effective May 14, 1992. Mr. Schleibaum also was determined to be totally disabled by the Social Security Administration and began receiving benefits in June 1992. App. at 32a.

But on August 28, 1992, Kmart notified Mr. Schleibaum that based on its review of the medical evidence provided, he was not "totally and permanently medically disabled," and that his group life insurance would not be continued by Kmart. Schleibaum was advised that he should "forward any additional information or medical reports which you wish to have considered as part of your appeal." The letter did not provide a description of the type of additional information or medical reports necessary for Mr. Schleibaum to perfect his claim or a clear explanation of why such information was necessary. App. at 34a-36a.

Mr. Schleibaum responded by letter dated September 24, 1992 and enclosed another attending physician statement, dated September 21, 1992, and the determination from the Social Security Administration. App. at 36a-37a. Mr. Schleibaum's attending physician stated that his progress had stabilized, and, under "prognosis," that the patient was now totally disabled for his job and any other work. The doctor noted that Mr. Schleibaum was unable to stand more than 15 minutes, sit for extended periods, bend greater than 75 degrees, stoop, or kneel. App. at 37a-38a.

Kmart did not consider what occupation Mr. Schleibaum could perform given the fact that he could not sit or stand continuously or walk even intermittently. App. at 45a. On October 12, 1992, Kmart notified Mr. Schleibaum that his appeal was denied. App. at 38a. For the first time, a specific provision of the Plan was referenced:

> The provisions of the Group Term Life Insurance policy are as follows: The term "permanently and totally disabled" means that the employee, due to illness or injury, is not engaged in her or any other gainful occupation, and will continue to be unable, for life, to engage in any gainful occupation for which she is, or may reasonably become, fitted by education, training or experience.

App. at 38a. The letter again failed to provide a description of the type of additional information or medical reports necessary for Mr. Schleibaum to perfect his claim or a clear explanation of why such information was necessary. App. at 38a.

Mr. Schleibaum responded to the denial of his appeal by letter dated October 26, 1992, in which he stated that his physician did not think he would ever be able to return to work. The letter he attached from his doctor reiterated that although Mr. Schleibaum was recovering from the surgery, Dr. Rosenberg did not think Mr. Schleibaum would "ever be able to return to active employment other than that of the most sedentary kind." The doctor indicated that Mr. Schleibaum would not be able to walk without a cane or work under requirements of "continuous sitting, standing or even intermittent walking." App. at 39a.

Kmart responded to Mr. Schleibaum's letter of October 26, 1992, stating that

> [t]he provisions of the Group Term Life Insurance Policy are as follows: The term "permanently and totally disabled" means that the employee, due to illness or injury, is not engaged in his or any other gainful occupation, and will continue to be unable, for life, to engage in *any gainful occupation* for

> which he is, or may reasonably become, fitted by education, training or experience.
>
> Dr. Rosenberg's letter clearly states "I do not think that he will ever be able to return to active employment *other tha[n] that of the most sedentary kind*." (copy attached) Based on this documentation, we must reaffirm our previous determination.

App. at 40a (italics in original). This last letter from Kmart did not invite any further appeal. *See* App. at 40a.

Even though Kmart believed the doctor had not properly understood Kmart's form, no additional information was sought. The benefits were just denied. App. at 40a, 44a.

Kmart failed to communicate the distinction it was making between "long term disability" and "permanent and total disability." The Rule of Administration which contains the definition of "permanently and totally disabled" was not adopted until September 8, 1992, after Kmart's initial denial of Mr. Schleibaum's claim. App. at 42a. Kmart did not reference the Rule in any of its correspondence with Mr. Schleibaum that was dated either before or after the Rule was adopted. *See* App. at 38a. Kmart did not inform Mr. Schleibaum that the fact he qualified for long term disability did not necessarily render him permanently and totally disabled. *See* App. at 34a-36a. The forms which Kmart asked Mr. Schleibaum to submit to demonstrate that he was permanently and totally disabled were the same forms that he had been asked to submit to Aetna to apply for long term disability benefits. App. at 31a-32a.

The Employee's Group Life Insurance Plan booklet, in the section entitled "When Your Coverage Ends," states that

> [i]f you become permanently and totally disabled before age 60 while actively employed, the Company will continue your basic and optional life insurance coverage until your disability ends or you reach age 65, whichever come first.

App. at 33a. No mention is made of an option to convert to an individual policy in that section. *See* App. at 33a.

In the letter from Kmart to Mr. Schleibaum on March 12, 1992, which outlined Mr. Schleibaum's benefits during his approved medical leave of absence, Kmart reminded Mr. Schleibaum that he was

> currently insured for $59,000 under the non-contributory life insurance plan with an additional $177,000 under the contributory portion of the policy totaling $236,000. This coverage will remain in force during your approved medical leave of absence for a maximum of one year. Should your disability be of a permanent and total nature, you may be eligible for continued coverage under the premium waiver provisions of the policy. If approved, your group life and optional life insurance may be continued for you at no cost until age 65.

App. at 32a. The description did not contain any reference to an option to convert the life insurance coverage to an individual policy. *See* App. at 32a.

The only time Kmart informed Mr. Schleibaum about the option to convert was in the letter dated August 28, 1992, in which Kmart first informed him that he was not totally and permanently disabled and that his group life insurance would not be continued by the company. In this letter, Mr. Schleibaum

was advised by Kmart as to the actions he could take in response:

> Your group life insurance coverage through the Company will cease effective November 13, 1992 upon expiration of the maximum one year period of medical leave permitted under the Company's leave of absence policy.
>
> Should you believe this determination is not correct, you have the right to appeal it. . . .
>
> You may, if you wish, elect to convert all or any portion of the life insurance coverage to an individual policy, (excepting a policy of term insurance) with the Aetna Life Insurance Company provided you do so within 31 days of the date your coverage terminates. To do this you should contact the Aetna Life Insurance Company at (313) 637-6000 and request conversion of your group coverage.

App. at 35a.

B. The petition makes certain misrepresentations regarding the District Court's opinion.

Kmart's assertion that the District Court did not find a violation of section 502(a)(1)(B) is misleading in that it implies the District Court resolved that issue. Pet. at 8. It did not. The District Court did not resolve several contested issues, including this one. App. at 24a.

Kmart also contends that the District Court reviewed new evidence *de novo*, and taking for granted how the Life Plan Administrator would evaluate the new evidence, held that

remand was not an appropriate remedy. Pet. at 9. It did not. The District Court found that neither party could provide additional evidence because of the death of Mr. Schleibaum (App. at 53a), and that

> Kmart has made it clear that it would not determine that Mr. Schleibaum was eligible for benefits without seeing new evidence of a type that plaintiffs cannot possibly find or produce.

App. at 55a.

C. The petition misrepresents the holding of the Seventh Circuit.

The question decided by the Seventh Circuit was the appropriate remedy for a violation of 29 U.S.C. § 1133 (failure to give adequate notice of a denial of a claim for benefits) when a remand would be futile. Kmart refuses to acknowledge either its violation of section 503 or the futility of remand in its statement of the case and subsequent argument.

Kmart states that the Seventh Circuit found that it had violated section 503, only because Kmart failed to notify Mr. Schleibaum of his right to appeal in subsequent letters to him. Pet. at 9-10. The Seventh Circuit agreed with the District Court that Kmart had violated section 503, because Kmart never told Mr. Schleibaum what medical information to submit to perfect his claim, and because Kmart did not even imply the real reason for the denial of benefits until it was too late for Mr. Schleibaum to still do something about it. App. at 6a.

The Seventh Circuit's determination of an appropriate remedy was not based on assumptions, but rather on the fact that the impossibility of going back to the plan administrator

was caused by Kmart's failure to comply with the statutory provisions set forth in section 503. The matter of the relief was remanded to the District Court for one appropriate to remedy the substantive harm caused by Kmart's actions and because Kmart had not met its burden as to the mitigation it sought. App. at 10a, 15a.

The Seventh Circuit's decision that substantive harm resulting from a procedural violation can be remedied is not inconsistent with the holdings of this Court and other Courts of Appeals.

REASONS FOR DENYING THE WRIT

The repeatedly-emphasized purpose of ERISA is "[t]o protect contractually defined benefits." *Massachusetts Mutual Life Insurance Company v. Russell*, 473 U.S. 134, 148 (1985) (citing *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 374-75 (1980) and 120 Cong. Rec. 29196 (1974), 3 Leg. Hist. 4665; 119 Cong. Rec. 30041 (1973), Leg. Hist. 1633). The Seventh Circuit's decision is consistent with this purpose, as well as with the decisions by this Court and the other Courts of Appeals.

I.

THE SEVENTH CIRCUIT'S DECISION AS TO AN APPROPRIATE REMEDY FOR VIOLATION OF SECTION 503 IS NOT IN CONFLICT WITH THIS COURT'S DECISIONS.

The remedy ordered by the Seventh Circuit, after finding that Kmart had violated section 503 of ERISA, is not in conflict with decisions of this Court and other Courts of Appeals. A review of the Seventh Circuit's decision shows that holdings

of this Court and the various federal circuits as to an appropriate remedy when substantive harm had been caused as the result of a violation of the notice provisions of ERISA were properly set forth and followed by the Seventh Circuit.[2]

A. The issue is the appropriate remedy for a substantive harm resulting from a violation of section 503, not for a breach of fiduciary duty.

Kmart attempts to rewrite the Seventh Circuit's opinion in order to find support for its contention that the decision conflicts with decisions of this Court and other Courts of Appeals. Rather than address the appropriate remedy for a violation of section 503 (notice required for denial of claims), Kmart discusses at length cases addressing the appropriate remedy for violation of section 404(a) (breach of fiduciary duty). Pet. at 12-18. Kmart

---

2. The Seventh Circuit held that if Mr. Schleibaum was entitled to a continuation of his life insurance then, pursuant to 29 U.S.C. § 1132(a)(1)(B), the Respondents, as his beneficiaries, would be entitled to a substantive remedy. *Schleibaum v. Kmart Corporation*, 153 F.3d 496, 504 (7th Cir. 1998). But, as both the District Court and the Seventh Circuit recognized, the "puzzle" in this case is that it is impossible to determine with hindsight whether Mr. Schleibaum would have been entitled to a continuation of the policy. Mr. Schleibaum died shortly after his claim was denied by Kmart, and Kmart made it clear to the District Court " 'that it could not determine that Mr. Schleibaum was eligible for benefits without seeing new evidence of a type that [the Respondents] cannot possibly find or produce.' " *Id.* at 503, 504. Because the impossibility of providing the evidence required by Kmart arose due to its failure to inform Mr. Schleibaum about the information needed from him to perfect his claim, the Seventh Circuit determined that Kmart may not now benefit from its violation of the ERISA statute. Accordingly, the Seventh Circuit held that the District Court must exercise its equitable powers in fashioning an appropriate measure of damages to remedy the substantive harm resulting from Kmart's violation of the notice provisions of ERISA. *Id.* at 504.

fails to address, let alone explain, why the cases setting forth the remedies for a breach of fiduciary duty should have been followed by the Seventh Circuit, rather than the cases examining the remedy for substantive harm from the violation of the notice provision.

Kmart was found to have violated section 503 of ERISA, not section 404, and the record clearly supports this finding by both the District Court and the Seventh Circuit. Kmart pointedly avoids discussing the remedy appropriate for a violation of section 503. Instead, its argument throughout the petition focuses on the appropriate remedy for a plan administrator's breach of fiduciary duty. Pet. at 12-18.

The Seventh Circuit held that the substantive remedies provided in 29 U.S.C. § 1132(a)(1)(B) are available to the Schleibaum beneficiaries because the procedural errors committed by Kmart led to a substantive harm. Contrary to the claims of Kmart, this holding is not inconsistent with the holdings of this Court in either *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), or *Varity Corporation v. Howe*, 516 U.S. 489 (1996).

The question raised in *Mertens* was whether a nonfiduciary who knowingly participated in the breach of a fiduciary duty imposed by ERISA is liable for losses that an employee benefit plan suffered as a result of the breach. 508 U.S. at 249. Noting first that it was unclear that a remediable wrong had even been committed, this Court restricted its analysis in *Mertens*, as it would later do in *Varity*, to the remedies authorized under section 1132(a)(3), this time with respect to nonfiduciaries. 508 U.S. at 254-62. An appropriate remedy for substantive harm resulting from procedural errors committed by a fiduciary was not addressed by this Court in *Mertens*. Therefore, the Seventh Circuit's decision cannot be in conflict with the holding in *Mertens*.

In *Varity*, the issue before this Court was whether ERISA authorized a lawsuit for individual relief for a plan administrator's breach of fiduciary duty. As Kmart does here, the plan administrator had argued that Congress intended for the standards to protect the integrity of the plan, not individual beneficiaries. This Court rejected that argument, holding that Congress had clearly provided remedies for individual beneficiaries harmed by breaches of fiduciary duty. 516 U.S. at 507. After examining all of the remedies set forth in section 502(a), this Court found that section 1132(a)(3) provided a remedy because the plaintiffs could not proceed under section 1132(a)(1) since they were no longer participants or beneficiaries of the plan and, "therefore, had no 'benefits due [them] under the terms of [the] plan.' " 516 U.S. at 515.

The remedy upheld by this Court in *Varity* was for a violation of the ERISA imposed fiduciary obligations set forth in section 404. The remedy provided by the Seventh Circuit in the case at bar is for a violation of ERISA imposed notice requirements set forth in section 503. The relief provided in *Varity* was equitable relief to redress a violation of section 404(a). The relief provided in this case is the recovery of benefits due under the plan to redress a violation of section 503. There is no conflict between this Court's holding in *Varity* and the Seventh Circuit's holding is this case.

Kmart's criticism of the Seventh Circuit for failing to "even pay lip service" to this Court's decisions in *Mertens* and *Varity* is particularly suspect in light of this Court's admonition to the parties in *Lockheed Corporation v. Spink*, 517 U.S. 882, 889 n.3 (1996), that statements in *Mertens* as to any issue other than the one at issue in the case are dicta.

B. The remedy sought is recovery of benefits due under the plan, not extracontractual damages.

Kmart also insists on referring to the remedy sought by the Schleibaum beneficiaries as "extracontractual." It is not. The Schleibaum beneficiaries seek the benefits under the plan to which they would have been entitled if Kmart had not violated section 503 of ERISA.[3]

---

3. Congress passed ERISA in order to assure that those who participate in employee benefit plans actually receive the benefits to which they are entitled. H.R. Rep. No. 93-807, 93rd Cong., 2d Sess. 3, reprinted in 1974 U.S. Code Cong. & Admin. News 4639, 4670, 4676-77. Section 502 of ERISA provides that the relief to which a beneficiary is entitled is the benefits due him under the terms of the plan. 29 U.S.C. § 1132(a)(1)(B). Section 502 permits participants or beneficiaries to recover those benefits to which they are contractually entitled. *Harsch v. Eisenberg*, 956 F.2d 651, 655 (7th Cir. 1992); *see Massachusetts Mutual Life Insurance Company v. Russell*, 473 U.S. 134, 136 (1985) (beneficiary asserting claim under section 409(a) of ERISA limited to contractual benefits). The benefits under section 502(a)(1)(B) are based on the terms of the plan, which define the scope of the entitlement the plan creates. 29 U.S.C.§ 1132(a)(1)(B).

When the policy at issue is a life insurance policy, "those who participate in the plan can expect to receive the benefits they are entitled to at death." *VanderKlok v. Provident Life & Accident Ins., Co.*, 956 F.2d 610, 614 (6th Cir. 1992). Kmart's plan entitled Mr. Schleibaum to continued life insurance coverage if he were determined to be totally and permanently disabled. *See* App. at 33a. Thus, the benefit due to the Schleibaum beneficiaries is the amount for which their father's life would have been insured. *See Harsch*, 956 F.2d at 655.

Kmart's Employees' Group Life Insurance Plan booklet informed employees that if they became permanently and totally disabled before age 60 while they were actively employed, "[Kmart] will continue your basic and optional life insurance coverage. . . ." App. at 33a. Kmart pointed this out to Mr. Schleibaum in the letter of March 12, 1992, and again in the letter of August 28, 1992. *See* App. at 32a, 34a-35a. The "life insurance coverage" is described as the "life insurance benefit," and is the benefit due to the Schleibaum beneficiaries under the plan.

The issue of an extracontractual remedy was discussed in *Massachusetts Mutual Life Insurance Company v. Russell*, 473 U.S. 134 (1985). The participant brought an action for breach of fiduciary duty and sought compensatory and punitive damages. She did not seek to recover any benefits due her under the plan, because the plan administrator had already reversed his previous denial and paid the participant all the benefits to which she was entitled. The plan administrator appealed the Ninth Circuit's holding that damages for breach of fiduciary duty could be recovered to "make the aggrieved party whole" including damages for mental and emotional distress, as well as punitive damages. *Id.* at 138.

This Court disagreed and held that extracontractual damages could not be recovered for a violation of section 409 (liability for breach of fiduciary duty). As this Court pointed out in the discussion of the remedies found in section 502(a) cited by Kmart in *Russell*, if the plan administrator had adhered to his initial determination and denied the participant the benefits, "[t]o recover the benefits due her, [the participant] could have filed an action pursuant to § 502(a)(1)(B) to recover the accrued benefits." *Id.* at 146-47. This is precisely what the Schleibaum beneficiaries did. As with the holdings in *Mertens* and *Varity*, the Seventh Circuit's decision in this case is not in conflict with the holding of this Court in *Russell*.

Nor is the Seventh Circuit's decision in conflict with those of other Courts of Appeals as Kmart alleges. None of the cases cited by Kmart as collected and summarized in *McLeod v. Oregon Lithoprint, Inc.*, 102 F.3d 376, 378 n.2 (9th Cir. 1996), *cert. denied*, __ U.S. __ (1997), address the issue of an appropriate remedy for substantive harm resulting from the violation of section 503.[4] For example, Kmart asserts that the

4. Of the fourteen cases collected and summarized in note 2 and the accompanying text, damages were sought under section 502(a)(3) (Cont'd)

(Cont'd)
for breach of fiduciary duty in nine of them, *Concha v. London*, 62 F.2d 1493 (9th Cir. 1995), *cert. denied*, 517 U.S. 1183 (1996); *Sokol v. Bernstein*, 803 F.2d 532 (9th. Cir. 1986); *Armstrong v. Jefferson Smurfit Corp.*, 30 F.3d 11 (1st Cir. 1994); *Lee v. Burkhart*, 991 F.2d 1004 (2nd Cir. 1993); *Hein v. F.D.I.C.*, 88 F.3d 210 (3rd Cir. 1996); *Powell v. Chesapeake and Potomac Tel. Co.*, 780 F.2d 419 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986); *Sommers Drug Stores Co. v. Corrigan Enters.*, 793 F.2d 1456 (5th. Cir. 1986), *cert. denied*, 479 U.S. 1034 (1987); *Fraser v. Lintas: Campbell-Ewald*, 56 F.3d 722 (6th Cir. 1995), *cert. denied*, 516 U.S. 975 (1995); *Novak v. Andersen Corp.*, 962 F.2d 757 (8th Cir. 1992), *cert. denied*, 508 U.S. 959 (1993). The courts in these cases consistently held that contractual damages were not available for breach of fiduciary duty. But, as the Eighth Circuit noted in *Novak*, "[n]o one disputes that ERISA allows a beneficiary such as Novak to get 'contractual' damages — *i.e.*, funds to which he is entitled under the Plan — under a different ERISA provision. *See* 29 U.S.C. § 1132(a)(1)(B) (ERISA § 502(a)(1)(B))." *Id.* at 759.

Damages were sought under section 502(a)(3) for the unlawful discharge of an employee for exercising any right entitled under an employee benefit plan in two of the cited cases, *Spinelli v. Gaughan*, 12 F.3d 853 (9th Cir. 1993); *Zimmerman v. Sloss Equip., Inc.*, 72 F.3d 822 (10th Cir. 1995).

Damages were sought under section 502(a)(1)(B) in only three of the cases. In *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517 (9th Cir. 1993), the plaintiff sought the payment of benefits for a claim of equitable estoppel. The Ninth Circuit upheld the District Court's finding of equitable estoppel, but held that the remedy of recovery of benefits was not available because payment would be inconsistent with the unambiguous written plan. In *Harsch v. Eisenberg*, 956 F.2d 651 (7th Cir. 1992), *cert. denied*, 506 U.S. 818 (1992), the plaintiff sought benefits due under the plan, as well as compensatory and punitive damages. Before the matter was decided by the District Court, the plan paid the benefits previously denied. The plaintiff continued the suit for compensatory damages caused by the delay in payment and punitive
(Cont'd)

argument raised by the plan participant in *McLeod* is virtually identical to the argument advanced by the Schleibaum beneficiaries. Kmart is factually incorrect. In *McLeod*, the plaintiff sought relief for a breach of fiduciary duty under section 404 against her employer, because the employer had failed to notify her that she had become eligible to apply for coverage under a cancer insurance policy. The compensatory damages sought by McLeod were the amount of benefits that would have been paid to her if she had elected coverage under the cancer policy and for emotional distress. *Id.* at 377. In the case at bar, the Seventh Circuit and the District Court found that Kmart violated section 503, not section 404. The damages sought are the benefits due the Schleibaum beneficiaries under the plan and specifically permitted under 29 U.S.C. § 1132(a)(1)(B) (ERISA §502(a)(1)(B)).[5]

Kmart also cites *Bast v. Prudential Ins. Co. of America*, 150 F.3d 1003 (9th Cir. 1998), as further support for its

---

(Cont'd)
damages. The Seventh Circuit held that section 502(a)(1)(B) did not provide for extracontractual damages, only the benefits due under the plan. *Id.* at 655. In *McRae v. Seafarers' Welfare Plan*, 920 F.2d 819 (11th Cir. 1991), the Eleventh Circuit directed the plan to pay the medical bills which were benefits due under the plan and wrongly denied, but held that extracontractual benefits were not available under section 502 (a)(1)(B).

5. The compensatory damages sought in the cases brought for breach of fiduciary duty are monetary relief for all losses the respective plan sustained as a result of the alleged breach of fiduciary duty. The damages sought in the case at bar for a violation of section 503 are the benefits clearly promised to the Schleibaum beneficiaries under the terms of the plan, which they did not receive because of Kmart's violation of the notice provisions. Kmart ignores not only this distinction, but also the consistency with which the decisions addressing a section 503 breach are handed down.

argument that compensatory damages are not appropriate. But again, the compensatory damages sought by Bast and held by the Ninth Circuit to be unavailable for a breach of fiduciary duty were for loss of chance of survival, for out of pocket costs, loss of income, loss of consortium, and emotional distress. Prudential had already reimbursed Bast for the benefits wrongly denied under the plan. *Id.* at 1006, 1009.

Throughout its argument Kmart stresses the need for courts to follow the remedial scheme carefully crafted by Congress to promote consistency and predictability. The principle is correct, but Kmart's application of it is not. Consistency and predictability are fostered when the existing law with respect to a violation of section 503 is followed in a case where section 503 has been violated. There is no need, and no reason, to look to cases addressing the violation of section 404 when specific law exists on section 503 breaches.

This is not an action for breach of fiduciary duty and extracontractual damages. The Seventh Circuit's decision is consistent with this Court's decisions and those of the other Courts of Appeals which have held that recovery of benefits due under the plan is appropriate in an action for violation of section 503 where substantive harm has resulted.

II.

THE SEVENTH CIRCUIT'S DECISION THAT REMAND HAS BEEN MADE FUTILE BY KMART'S VIOLATION OF SECTION 503 DOES NOT CONFLICT WITH OTHER COURTS OF APPEALS ON THIS ISSUE.

Kmart violated ERISA section 503. It failed to give adequate notice of a denial of a claim for benefits to Mr. Schleibaum. The issue before the Seventh Circuit was the

appropriate remedy for Kmart's violation when a remand would be futile. The Courts of Appeals have consistently ruled that remand to the plan administrator is not necessary where it "would be a 'useless formality.' " There is no conflict among the circuits with respect to this issue. *See, e.g., Kent v. United of Omaha Life Insurance Company*, 96 F.3d 803, 807 (6th Cir. 1996) (remand only appropriate when more than a "useless formality"); *Miller v. United Welfare Fund*, 72 F.3d 1066, 1071 (2d Cir. 1995) (no remand if it would be a "useless formality"); *Welsh v. Burlington Northern, Inc. Employees Benefits Plan*, 54 F.3d 1331, 1340 (8th Cir. 1995) (District Court not required to remand the case when remand " 'would be a useless formality' "); *Wolfe v. J.C. Penney Co., Inc.*, 710 F.2d 388, 394 (7th Cir. 1983) (quoting *Wardle v. Central States, Southeast & Southwest Areas Pension Fund*, 627 F.2d 820, 828 (7th Cir. 1980)) ("No remand is necessary, however, where it 'would be a "useless formality ." ' ").

A. The issue is whether remand to the plan administrator is required when it would be a useless formality.

The Seventh Circuit's decision is not in conflict with other Courts of Appeals on this issue. Kmart's violation of ERISA coupled with its clear pronouncement that it "could not determine that Mr. Schleibaum was eligible for benefits without seeing new evidence of a type that plaintiffs cannot possibly find or produce" (App. at 55a) has made the remand it seeks futile, as Kmart has admitted. It is impossible for the Schleibaum beneficiaries to obtain the new evidence Kmart requires for its new review.

Mr. Schleibaum's physician testified that when he was treating Mr. Schleibaum, in the latter part of 1991, in addition to the problem with his hip, Mr. Schleibaum had significant coronary disease, hypertension, a history of thromboembolic

disease, and massive obesity. *See* App. at 7a, 9a, 44a. Kmart now insists that this evidence did not provide the proof it required to find that Mr. Schleibaum was totally and permanently disabled, and that evidence of a different type was needed. *See* App. at 54a-55a. However, as the physician testified, because Mr. Schleibaum is dead, he is not now able to determine whether Mr. Schleibaum was capable of performing any kind of work in May 1993. App. at 44a-45a, 53a.

Because Kmart failed to identify the type of medical evidence that could lead to a grant of the benefit at issue, Mr. Schleibaum was not given the opportunity to obtain that evidence while it was still possible to do so. App. at 47a-52a, 54a-55a. The problem of proof of eligibility is of Kmart's own making, and the Seventh Circuit determined that Kmart may not reap the benefits of its failure to comply with ERISA requirements. This determination is consistent with other decisions which have considered the same issue. *See, e.g., VanderKlok*, 956 F.2d at 617 (ERISA defendant's failure to give appropriate notice taken into consideration in determining available remedies); *Leigh v. Engle*, 727 F.2d 113 (7th Cir. 1983) (ERISA plaintiffs should not be denied recovery where factual uncertainties relevant to a remedy were caused by defendants' violation of ERISA); *Schaub v. Consolidated Freightways, Inc. Extended Sick Pay Plan*, 895 F. Supp 1136, 1146 (S.D. Ind. 1995) (citing in support *Halpin v. W.W. Grainger, Inc.*, 962 F.2d 685 (7th Cir. 1992)) (ERISA plaintiff awarded benefits without remand because determination as to employability would be speculative as a result of procedural errors by plan administrator and plaintiff's subsequent medical deterioration).

This determination is also consistent with federal common law principles in interpreting ERISA plans.

> It is basic contract law that a party who prevents the occurrence of a condition precedent may not stand on that condition's non-occurrence to refuse to perform his part of the contract.

Swaback v. American Information Technologies Corporation, 103 F.3d 535, 542 (7th Cir. 1996). Kmart's violation of the notice requirements prevented the occurrence of the condition precedent to the continuation of the life insurance coverage — Mr. Schleibaum's proof of disability in a form required by Kmart. The Seventh Circuit determined that Kmart should not be permitted to benefit from its inducement of the non-occurrence of that condition. *See id.*

But even though a remand to the plan administrator would be pointless and clearly an exercise in futility, as it did in its first argument in support of its petition for certiorari, Kmart refashions the Seventh Circuit's decision and offers authority in support of its version rather than the actual decision. Kmart argues that the Seventh Circuit erred by not applying the deferential standard of review to the actions of its plan administrator, and cites *Taft v. Equitable Life Assur. Society*, 9 F.3d 1469 (9th Cir. 1993), and the cases collected therein, in support.

But the Seventh Circuit did not review Kmart's denial of benefits to determine if there had been an abuse of discretion. It reviewed Kmart's actions leading up to the denial, and its affirmation of that denial, to determine if section 503 had been followed. None of the cases cited by Kmart hold that a deferential standard of review applies in section 503 violations.

It is not disputed that if Kmart had complied with the notice provisions, its decision would have been subject to a deferential standard of review by the District Court. But Kmart did not

comply with section 503, and as a result of its violation, Mr. Schleibaum was not given the opportunity to provide medical evidence of a type that Kmart apparently knew it required — but Mr. Schleibaum did not — before it became impossible to do so. Kmart's argument that a deferential standard of review is required is without logic, and not supported by citations to authority.

B. The issue is whether the failure to present evidence regarding all of Mr. Schleibaum's medical problems is the result of Kmart's violation of ERISA.

Kmart also argues that the Schleibaum beneficiaries must bear the substantive harm caused by Kmart's own violation of section 503, because Mr. Schleibaum failed to put the Life Plan Administrator on notice regarding all of his medical problems. But any failure to do so was caused by Kmart's procedural violation of ERISA. Kmart's actions in the case at bar prejudiced Mr. Schleibaum's ability to resolve the issue of his eligibility for the continued life coverage through the appeal structure while it was still possible to obtain the information which Kmart now claims it required.

Again the cases cited by Kmart in support of its argument do not address the issue in case at bar and are often taken out of context. Kmart asserts that in *Sandoval v. Aetna Life and Casualty Insurance Company*, 967 F.2d 377, 379-81 (10th Cir. 1992), "[t]he plan administrator was not required to ferret out evidence of other medical conditions . . . that did, at least eventually, render the plan participant totally disabled." Pet. at 22. But this statement was made in the context of a finding by the Tenth Circuit that the plan administrator had fully complied with the statutory requirements of section 503. *See id.* at 382. Such was not the case for Mr. Schleibaum.

Kmart refuses to recognize what it was required by section 503 to do. In italics, Kmart asks, "*Was the Life Plan Administrator to be clairvoyant?*" Pet. at 23. The answer is no, just as Mr. Schleibaum was not expected to be clairvoyant. Compliance with section 503 by Kmart would have eliminated the need for clairvoyancy on the part of either Mr. Schleibaum or Kmart's Life Plan Administrator.

Kmart sounds the alarm that the Seventh Circuit's ruling will require plan administrators to rule out all potential diagnoses for the benefits sought by a plan participant, and that this is incompatible with the need for consistency and predictability. Kmart is wrong. The Seventh Circuit's ruling is only that plan administrators must comply with section 503 when a claim is denied. *I.e.*, the Plan Administrator must consider the factors that are relevant to the important aspects of the decision, and articulate an explanation to the plan participant that makes a rational connection between the issue, the evidence, the text and the decision made. *Cuddington v. Northern Ind. Pub. Serv. Co.*, 33 F.3d 813, 817 (7th Cir. 1994). That is what plan administrators have always been required to do under section 503. *See, e.g., Halpin v. W.W. Granger, Inc.*, 962 F.2d 685 (7th Cir. 1992); *Wolfe v. J.C. Penney Co., Inc.*, 710 F.2d 388 (7th Cir. 1983).

When remand to the plan administrator is not appropriate, the court's discretion includes ordering reinstatement of the benefits at issue or ordering the plan in question to pay the claimant the benefits that were improperly denied. *See Halpin*, 962 F.2d at 697 (reinstatement appropriate where ERISA violation prevented opportunity for full and fair review); *Govindarajan v. FMC Corp.*, 932 F.2d 634, 636 (7th Cir. 1991) (plan ordered to pay back benefits). The Seventh Circuit's decision, as written, is consistent with the decisions of this Court and other Courts of Appeals as to when remand is required and the relief appropriate to remedy a substantial harm.

CONCLUSION

For the reasons given above, Kmart's petition for certiorari should be denied.

Respectfully submitted,

ANDREW C. MALLOR
Counsel of Record
GEOFFREY M. GRODNER
KENDRA GOWDY GJERDINGEN
MALLOR CLENDENING
GRODNER & BOHRER
Attorneys for Respondents
Post Office Box 5787
511 Woodscrest Drive
Bloomington, Indiana 47407
(812) 336-0200